TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 51

STELLA BARBER, PETITIONER,

vs.

B. GEORGE BARBER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

PETITION FOR CERTIORARI FILED APRIL 6, 1944.

CERTIORARI GRANTED MAY 15, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

STELLA BARBER, PETITIONER,

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B. GEORGE BARBER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

INDEX.

[fol. 1] [Caption omitted]

Prosecution Bond for Costs omitted in Printing.

IN THE CHANCERY COURT OF HAMILTON COUNTY, TENNESSEE

No. 28407

STELLA BARBER

vs.

B. GEORGE BARBER

ORIGINAL BILL—Filed November 13, 1940

To the Hon. J. L. Foust, Chancellor, Holding the Chancery Court at Chattanooga, Tennessee:

[fol. 2] Complainant respectfully shows to the Court:

I

That on the 13th day of June, 1940, in the Superior Court of Buncombe County, North Carolina, she recovered a final judgment for alimony against defendant, B. George Barber, in the sum of $19,707.20, all of which remains unpaid. A copy of said judgment, duly certified according to the Act of Congress and the statute of Tennessee, by the Clerk of said Court, under the Seal of the Court, and by the Presiding Judge of the Court, is hereto attached as "Exhibit A" and made a part of this bill, but not for copy in issuing process.

II

The defendant is now a non-resident of North Carolina, and has no property or assets in said State available for the satisfaction of said judgment, and complainant has not been able to enforce payments of said alimony as it accrued. He is now a resident of Chattanooga, Tennessee, where he is engaged in business. Complainant has resided in Asheville, North Carolina, ever since she was married to defendant many years ago.

Premises Considered, Complainant Prays:

1st: That subpoena to answer issue, to compel defendant to come into Court and answer this bill, but answer on oath is hereby waived.

2nd: That complainant have and recover of defendant that said sum of $19,707.20, with interest from the date of said judgment.

3rd: That complainant have such other, further and general relief as her case may require and may be just.

Stella Barber, Complainant.

E. K. Meacham; Cantrell, Meacham & Moon, Solicitors.

[fol. 3] *Duly sworn to by Stella Barber. Jurat omitted in printing.*

EXHIBIT "A" TO ORIGINAL BILL

NORTH CAROLINA, BUNCOMBE COUNTY IN THE SUPERIOR COURT

STELLA BARBER, Plaintiff,

v.

B. GEORGE BARBER, Defendant

JUDGMENT

This cause coming on to be heard and being heard before the undersigned Judge at the Regular June 1940 Term of the Superior Court for Buncombe County, upon the petition of the plaintiff to ascertain the amount owed to the plaintiff by the defendant under the former orders of this Court in this cause and for judgment therefor, and both plaintiff and defendant being heard by counsel, and the Court finding as a fact that the defendant is indebted to the plaintiff in the sum of Nineteen Thousand Seven Hundred Seven and 20/100 ($19,707.20) Dollars under the former order of this Court:

[fols. 4-6] Now, Therefore, It is ordered, adjudged and considered that plaintiff have and recover of the defendant the sum of Nineteen Thousand Seven Hundred Seven and 20/100 ($19,707.20) Dollars, together with the costs of this proceeding to be taxed by the Clerk, and that execution issue therefor.

This the 13th day of June, 1940.

(Signed) Wilson Warlick, Judge Superior Court.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 7] In the Chancery Court of Hamilton County

[Title omitted]

Order Overruling Plea—Enrolled December 9, 1940

This cause came on to be heard before the Honorable J. Lon Foust, Chancellor, on a motion to set the plea for argument because of insufficiency, upon consideration of which the court is of opinion that said plea is sufficient, and it is therefore ordered by the court that said plea be overruled.

In the Chancery Court of Hamilton County

Answer—Filed December 16, 1940

Comes now the defendant and for answer to the bill filed against him in this cause says:

I

Defendant denies that there is any valid final judgment against him in favor of the complainant as alleged in paragraph 1 of the bill for the reasons hereinafter set forth, and strict proof thereof is demanded.

II

Defendant admits that he is a non-resident of the State of North Carolina, and that he has resided in Hamilton County, Tennessee for more than eight years. Defendant denies that he is engaged in business, but on the contrary is merely a salaried employee of a small printing company. It is admitted that complainant had resided in Asheville, North Carolina for many years.

[fol. 8]

III

Defendant shows the Court that in the year 1920 the complainant instituted a suit against him in the Superior Court of Buncombe County, North Carolina asking for alimony, without divorce, for the maintenance and support of herself and three minor children. At the time the parties hereto were living apart, but defendant was

voluntarily paying complainant $200 per month, giving her exclusive possession of a valuable residence owned by him, paying the taxes, insurance and repairs on it, and was generally providing for complainant far better than his income justified. The complainant succeeded in obtaining a jury verdict making it mandatory upon the trial judge to grant an increase in allowance, but the suit was so manifestly unfair and inequitable that the trial judge limited the increase to one cent.

IV

Thereafter, on June 14, 1922, the defendant entered into a trust agreement with the Wachovia Bank & Trust Company, Trustee, of Asheville, North Carolina. By the terms of this agreement defendant conveyed practically all of his property valued at approximately $100,000 to the Trustee in trust for the use and benefit of the complainant and their three minor children. The said trust authorized the trustee to expend the net income, or so much thereof as might be necessary, and also to encroach upon the principal or corpus of the trust estate, for the support of complainant and the education and support of the children. Since the creation of this agreement, complainant has largely encroached into the corpus of the trust estate, as well as having used all the income. Defendant shows the Court that the last report submitted by the said Trustee [fol. 9] for the year ending June 14, 1932, reveals that during said period the Trustee made disbursements in behalf of complainant and the other beneficiaries, principally the complainant, of the total sum of Nine Thousand, Four Hundred Seventy-three and 59/100 ($9,473.59) Dollars. Of this amount, the income disbursements were Four Thousand, Five Hundred Seven and 88/100 ($4,507.88) Dollars and the principal disbursements or encroachments upon the corpus of the estate were Four Thousand, Nine Hundred Sixty-five and 71/100 ($4,965.71) Dollars. These disbursements include attorneys' fees paid by the Trustee in defending suits filed against it by creditors of the complainant, whom she had endeavored to defraud. The said trust agreement, duly authenticated copies thereof, will be produced at the hearing.

V.

In 1929 a hearing was had in the Superior Court of Buncombe County, North Carolina in said case, and a judgment was entered modifying the original order and reducing the monthly sum payable by defendant to complainant to the sum of $160 per month for the support of herself and minor children.

VI

On or about the 8th day of August, 1932, the complainant filed a suit in the Chancery Court of Hamilton County, Tennessee against this defendant, the same being case No. 25244, seeking to recover alleged arrears of separate maintenance without divorce in the sum of $1,100, as well as solicitors' fees and periodical installments for future months. So much of the bill as sought solicitors' fees and [fol. 10] decree requiring monthly installments in the future was dismissed on this defendant's demurrer, and the entire cause was later dismissed by the Chancellor. Defendant therefore says that the complainant is guilty of laches since she has done nothing on this alleged cause of action since 1932 toward enforcing it in the courts of Tennessee.

VII

On March 7, 1939, the complainant filed a petition and motion in the original cause of action in the Superior Court of Buncombe County, North Carolina. She alleged that this defendant instituted a suit for divorce against her in Fulton County, Georgia, and obtained a final decree April 1, 1929, and prayed the Court that this alleged divorce be declared a nullity. She alleged that the defendant had defaulted in the payments of $160.00 per month, the said default being a partial one from August 5, 1931, and a total one from August 5, 1932, and sought a judgment in the amount of $16,428.50 alleged to have been due her under the former judgment. She charged that the defendant was a non-resident of the State of North Carolina and prayed for an order directing that notice be served on the defendant by the Sheriff of Hamilton County, Tennessee, which was done. This defendant by counsel thereafter entered a special appearance in the cause for the sole purpose of moving to dismiss said petition for

one of jurisdiction of the person of the defendant, as he had not been served with valid process in North Carolina. In the case of Barber v. Barber, 216 N. C., 232; 4 S. E., 2d, 447, the North Carolina Supreme Court held that the original service of process in 1920 left the Court with juris- [fol. 11] diction, saying that the action of the Court was not ended by the rendition of a judgment, but was still pending and not final. The Court said:

> "This is particularly true of judgments allowing alimony and divorce actions, and in actions for alimony without divorce, in which is may not be said that the judgment is in all respects final.
> C. S. Supp., 1924, Sec. 1667."

VIII

Following the decision in the foregoing appeal this defendant was required to enter a general appearance and demurred to the complainant's petition. The matter was heard at the January, 1940 term of the Superior Court of Buncombe County, North Carolina, wherein the following order was entered:

> "This cause coming on to be heard and being heard before the undersigned Judge at the regular January term, 1940, of the Superior Court of Buncombe County, upon the demurrer filed by the defendant to the petition of the plaintiff in this cause, and *the Court being of the opinion and so holding that the petitioner cannot attack the validity of the Georgia divorce set out in the petition in this cause;*
>
> Now, therefore, it is Ordered that the demurrer filed by the defendant be, and the same hereby is, sustained as to that portion of the petition and the prayer for relief which seeks to have the Georgia divorce described [fol. 12] *described* in the petition declared a nullity. It is further Ordered that the demurrer be, and the same hereby is, overruled as to all matters set forth in said demurrer, with the exception of the Georgia divorce; and it is further Ordered that defendant shall have thirty days from the filing of this Order within which to file such pleadings as he may deem advisable. This the 19th day of January, 1940.
>
> Wilson Warlick, Judge Superior Court.

From the foregoing judgment the defendant excepted assigned error and appealed to the Supreme Court of North Carolina, the decision of which is reported as Barber v. Barber in 217 N. C., 422; 8 S. E., (2d) 204. No appeal from this judgment was taken by the complainant in this cause, consequently, it is res judicata that the complainant cannot attack the validity of the Georgia divorce obtained by this defendant from the complainant in 1929.

Defendant shows the Court that after having established a legal residence in Fulton County, Georgia he had filed a suit for divorce against the complainant in the Superior Court of Fulton County, Georgia on or about March 13, 1929, and thereafter defendant obtained two concurring jury verdicts in his favor and a final decree of absolute divorce from the complainant on April 1, 1929. Defendant respectfully shows that the Court subsequent to this divorce he has voluntarily paid to the complainant over $6,000 for her support and maintenance until he was no longer able to make any further payments to her.

[fol. 13] IX

This defendant is advised and charges that by reason of his decree of absolute divorce from the complainant an end has been put to his relation of marriage with the complainant as effectually as would have resulted from the death of either of the parties. This defendant, therefore, charges that all duties and obligations, legal or moral, which were dependent upon the continuance of the marriage relation, immediately ceased upon the entry of said decree of divorce in his favor and against the complainant on April 1, 1929. Defendant avers that the complainant was entitled, as a matter of law, to separate maintenance only so long as she remained his wife, and that he was obligated to pay for the support of the children only so long as they remained minors.

X

Defendant further shows the Court that the judgment upon which the complainant bases her cause of action was for separate maintenance, or alimony without divorce for the support of the complainant and the three minor children of the parties, and that all these children have long since attained their majority, and this defendant's liability for their future support is ended. Their oldest child, Frances

Barber, is now 33 years of age. Their son, George Barber, is now 30 years of age. Their youngest child, Eleanor, was 28 years of age in May, 1940. No legal or moral duty rested upon this defendant to support this youngest child for a long period of time prior to her becoming 21 years of age, as she was married to a prominent physician of Asheville, North Carolina, who lived with and supported her. By reason of the foregoing facts defendant charges that the [fol. 14] complainant is entitled to no judgment against him for separate maintenance, or alimony without divorce.

XI

Defendant charges that said decree upon which this suit is based is not a final decree, and accordingly is not entitled to full faith and credit by this Court under the Constitution of the United States. Defendant shows the Court that said judgment against this defendant for separate maintenance, or alimony without divorce, was rendered under the authority of Section 1667 of the North Carolina Code, which Code section among other things provides as follows:

> "The order of allowance herein provided for may be modified or vacated at any time, on the application of either party, or of any one interested."

The discretionary right of the Court to modify or vacate the judgment prevents complainant from acquiring any vested or absolute right to receive any such installments, even as to past due installments. Consequently complainant's judgment is not a final judgment, entitled to full faith and credit in this court under the provisions of Article 4, Section 1 of the Constitution of the United States.

Defendant also says because Section 1667 of the North Carolina Code, under which the complainant obtained her judgment, expressly authorizes the modification by the Court of an allowance, both as to accrued or future installments, or the vacating of the allowance, the said foreign judgment of the Superior Court of Buncombe County, North Carolina is not entitled to full faith and credit in [fol. 15] this Court under Article 4, Section 1 of the Constitution of the United States.

This defendant further shows the Court that in the decision of Barber v. Barber, 217 N. C. 444, 8 S. E. (2d) 204, rendered by the Supreme Court of North Carolina on April

10, 1940, it was expressly held on the remanding of this case to the Trial Court that the granting of a motion for the ascertainment of separate maintenance or alimony without divorce due a wife under former orders of the Court was not a "final judgment" since both the wife and husband may apply for other orders, and for modifications of orders already made, which the Court will allow as the ends of justice requires according to the changed conditions of the parties. The Court further held that the consolidation of the amounts of the alimony, or separate maintenance without divorce which were past due, when ascertained in one order or decree, does not invest any such lump sum decree with any other character than that which is originally had by way of installments. In this case of Barber v. Barber, supra, the Court further said:

> The motion in the cause can be dealt with only as a Petition for the ascertainment of the alimony due the plaintiff under former orders of the Court, looking toward enforcement against the defendant by appropriate proceeding. *It is not a final judgment in the action, since both the plaintiff and the defendant may apply for other orders and for modifications of orders already made, which the Court will allow as the ends of* [fol. 16] *justice require, according to the changed conditions of the parties.* The orders made from time to time are, of course, res judicata between the parties, subject to this power of the Court to modify them. *The consolidation of the amounts due, when ascertained in one order or decree does not invest any of these orders with any other character than that which they ordinarily had.*"

XII

This defendant also charges that no principle of comity or public policy requires this Court to enforce the decree of the Superior Court of Buncombe County, North Carolina to pay separate maintenance, or alimony without divorce, to a first wife and three minor children when in fact the first wife has been legally divorced since April 1, 1929, and the children have long since all become adults. This defendant is advised that in a Court of chancery a suit on a judgment may be defeated by a proof of facts showing that it would be against conscience to allow a recovery of such a judgment.

Defendant charges that the complainant has not come into this court with clean hands; that she has been guilty of laches; and that she is not entitled to any relief whatsoever. He avers that he has at all times endeavored to do more for the complainant than law or good conscience required of him. She has reduced him practically to insolvency by her continuous harassment with litigation. He respectfully avers that this Court should permit the complainant to bleed him no longer.

All matters in the complainant's bill not herein ad-
[fol. 17] mitted, denied or explained are here and now denied as fully as though separately denied, and defendant prays to be dismissed with his costs.

Shepherd, Curry & Levine, by Clifford Curry, Solicitors for Defendant.

[fol. 18] IN THE CHANCERY COURT OF HAMILTON COUNTY

STIPULATION RE PROOF OF NORTH CAROLINA RECORDS AND OPINIONS—Filed May 29, 1941

It is hereby agreed that, in lieu of filing certified copies, this Court may consider as duly proved the copies of the records on appeal in Case No. 109, Fall Term of 1939 and Case No. 100, Spring Term of 1940 attached hereto, and also the decision thereon of the Supreme Court of North Carolina in the two cases styled Barber v. Barber as reported in 216 N. C., 232; 4 S. E. (2d) 447 and in 217 N. C., 422; 8 S. E., (2d) 204, both decisions being prior appeals upon the authority of which judgment sued upon in the present case is predicated, all of which shall be admissible in evidence to prove or tend to prove the North Carolina law.

Complainant and defendant reserve the right to object, at the hearing of this case, to the relevancy and materiality of such evidence.

Cantrell, Meacham & Moon, by C. W. K. Meacham, Solicitors for Complainant. Shepherd, Curry & Levine, Solicitors for Defendant, by Clifford Curry.

IN THE CHANCERY COURT OF HAMILTON COUNTY

MEMORANDUM OPINION—Filed June 4, 1941

In 1920, in the Superior Court of Buncombe County, N. C., the complainant, Stella Barber, obtained a judgment against the defendant B. George Barber for alimony with-[fol. 19] out divorce of $200.01 per month. This was paid until August 1931, when the defendant got the monthly allowance reduced to $160.00 per month. This was alimony for the support of the complainant and her three minor children. The youngest of the three children is now twenty-eight years of age.

In 1929 George Barber, then a resident of Atlanta, Georgia, obtained a decree of divorce from the complainant, and has since remarried. He continued to pay alimony until 1932, and in 1939 suit was brought against him in the Superior Court of Buncombe County, N. C., by petition in the original suit, and a judgment was finally rendered against him for $19,707.20. The suit here is on the judgment obtained in North Carolina, George Barber now being a resident of Hamilton County, Tennessee. The judgment in North Carolina for said amount was for the monthly payments in arrears up to the date of the filing of the suit, or for arrearages of alimony. The suit is brought here, as before stated, on the judgment obtained in North Carolina, and it is insisted by the complainant that the courts of Tennessee must give full faith and credit to this judgment of the North Carolina court.

It is insisted by the defendant that this is not a final decree, and the defendant relies on statements made in the Superior Court of North Carolina in said suit originally brought there, and in which judgment was obtained. It is not a final decree in that it finally disposes of all the payments, or monthly allowances of alimony, but it is a final decree as to the amount of alimony that had accrued at the time of the filing of the suit.

[fol. 20] The suit heretofore brought, No. 25244, by the same parties before Judge Garvin during his life time, and his term as Chancellor in Hamilton County, is different in that it was brought in the courts here on the accrued and unpaid monthly allowances for alimony, while this suit is brought on a judgment obtained on the monthly allowance

or alimony in arrears at the time of the filing of this suit, and for this reason the reasoning made by Judge Garvin in that case does not apply to this case.

The full faith and credit clause of the Constitution of the United States is Article 4, Section 1 of said Constitution and is as follows:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state."

The court is of opinion that this clause of the Constitution applies to the judgment on which this suit is based, and that no defense can be made here except for service of process, which does not arise in this case since in the North Carolina case, in which the judgment was obtained, the defendant, B. George Barber, appeared and made defense.

The court is, therefore, of the opinion that the complainant is entitled to judgment against defendant for the amount of said judgment, together with interest thereon from the date of said judgment.

The defendant insists that when he got the divorce from [fol. 21] the complainant in Atlanta, Georgia, that terminated her right to alimony under the North Carolina decree. This defense might have been effective in North Carolina, but should have been made before the decree for the amount was obtained, and cannot be made in Tennessee in a suit on the decree.

It is insisted by the defendant that the decree sued on is subject to modification and, therefore, not final. It is not subject to modification after the adjournment of the term of court.

> "It has been the settled rule for some time that any order or decree made was during the term in fieri, and that the court during the time could vacate or modify the same."

Gwinn v. *Parker*, 119 N. C., 19

There is a stipulation filed in the cause as to certain exhibits, showing the law of North Carolina, and this is filed instead of the original or certified copies.

The court sees no objection to the admission of these exhibits as showing the laws of North Carolina, and the exceptions will be overruled.

The costs will be taxed against defendant, B. George Barber, with judgment over against complainant and surety on her cost bond.

J. L. Foust, Chancellor.

[fol. 22] IN THE CHANCERY COURT OF HAMILTON COUNTY

No. 28407

STELLA BARBER

vs.

B. GEORGE BARBER

DECREE—Enrolled June 26, 1941

This cause came on this day to be heard before the Hon. J. L. Foust, Chancellor, upon the original bill, the certified copy of the judgment attached as an Exhibit thereto, the stipulation on file, the original pamphlets filed in this cause of the records on appeal in case No. 109, Fall Term of 1939 and case No. 100, Spring Term of 1940, and the two decisions thereon of the Supreme Court of North Carolina referred to in the stipulation, and the entire record in the cause; from all of which the Court is of the opinion, as shown by his Memorandum Opinion, which is ordered to be filed and made a part of the record in this cause, that the judgment sued on is a final judgment, and that complainant is entitled to the relief sought.

It is therefore ordered, adjudged and decreed by the Court that complainant have and recover of defendant, B. George Barber, the sum of $19,707.20, the face amount of her judgment, together with interest from June 13, 1940, the date of said judgment, or a total of $20,866.62, for which execution may issue. The costs of the cause are hereby taxed against defendant, with judgment over against complainant and her surety on cost bond. Execution may issue therefor, first against defendant; and second, against complainant and her surety. To all of the foregoing the defendant duly excepted.

[fols. 23-24] [Cost Bond on Appeal for $250.00 filed June 15, 1943, omitted in printing.]

[fol. 25] [File endorsement omitted.]

IN SUPREME COURT OF TENNESSEE

STELLA BARBER, Complainant,

vs.

B. GEORGE BARBER, Defendant.

PETITION FOR A WRIT OF ERROR—Filed June 26, 1943

To the Supreme Court of Tennessee, Sitting at Nashville, Tennessee, or to Any of the Judges Thereof:

The petition of the defendant B. George Barber respectfully shows:

On the 26th day of June, 1941 a final decree was rendered against him and in favor of the complainant in this cause in the sum of $20,866.62 and court costs. This suit was based on a foreign judgment which the complainant had obtained against the petitioner in the Superior Court of Buncombe County, North Carolina on the 13th day of June, 1940. This judgment in North Carolina growing out of a suit for separate maintenance without divorce which the complainant had instituted against the petitioning defendant in 1920 in behalf of herself and three minor children, the youngest of the children now being 31 years of age.

Prior to the entry of the judgment against the petitioner [fol. 26] in North Carolina, and the filing of the present suit against him in Tennessee, the Supreme Court of North Carolina has twice had occasion in the original case to declare the general law of North Carolina, as well as its application to the parties in the present case. The original North Carolina litigation, which is also styled Stella Barber vs. B. George Barber, resulted in an opinion by the Supreme Court of North Carolina on September 7, 1939, reported in 216 N. C., 232, 4 S. E. 2d, and in a second opinion rendered on April 10, 1940, reported in 217 N. C., 204, 8 S. E. 2d, 204.

This case comes direct to this Court from the Chancery Court of Hamilton County, Tennessee because it was tried on the original bill, the answer of the defendant, and a stipulation by counsel that in lieu of filing certified copies the Court could consider as duly proved the decisions of the Supreme Court of North Carolina in these two cases styled Barber v. Barber as reported in 216 N. C. 232, 4 S. E. 2d,

447 and 217 N. C., 422, 8 S. E. 2d, 204, *both decisions being prior appeals upon the authority of which the judgment sued upon in the present case is predicted*, all of which shall be admissible in evidence to prove the North Carolina law.

These two reported decisions of the Supreme Court of North Carolina are therefore not simply general statements of the law of North Carolina, but *represent the particular law of this particular case.* The North Carolina judgment under Article IV, Section 1 of the Constitution of the United States shall have only such faith and credit given to it in every court within the United States *as it is by law or usage* [fol. 27] *in the courts of the state within which it was rendered.*

In 1929 complainant had instituted an action against the petitioner in the Supreme Court of Buncombe County, North Carolina for separate maintenance without divorce for herself and three minor children and a decree calling for $200.01 per month was obtained. Thereafter petitioner moved to Fulton County, Georgia and there obtained a final decree of absolute divorce from the complainant on publication on or about April 1, 1929. This absolute divorce terminated the relationship of husband and wife between petitioner and the complainant, and should have automatically ended his liability to pay separate maintenance without divorce, which is predicated on the theory of the continuance of the marital relationship.

Despite this absolute divorce, defendant continued to pay $200.01 per month until the North Carolina court permitted a reduction to $160.00 per month on October 15, 1929. Petitioner paid this reduced sum per month until about August, 1932. The youngest child thereafter became of age on May 21, 1933. Petitioner moved to Chattanooga where he married another woman on January 16, 1932. He has lived in Chattanooga, Tennessee with his second wife at all times since.

On August 9, 1932 complainant filed a suit in the Chancery Court of Hamilton County, Tennessee against the defendant, the same being case No. 25244, seeking to recover alleged arrears of separate maintenance without divorce. *This suit was dismissed on May 2, 1933 because the monthly allowances were not "final judgments" and consequently were not entitled to full faith and credit under Article IV,* [fol. 28] *Section 1 of the Constitution of the United States.*

Thereafter on March 7, 1939, in an effort to obtain a final judgment, *the complainant filed a petition and motion in the original case in the Superior Court of Buncombe County, North Carolina for a judgment for alimony arrearages.* She alleged that the defendant instituted a suit for divorce against her in Fulton County, Georgia and obtained a final decree on April 1, 1929 and prayed the Court to have this divorce declared a nullity. She charged that the defendant had defaulted in the payments of $160.00 per month and sought a lump sum judgment of the arrears due her in monthly installments. She charges that defendant was a non-resident of the State of North Carolina and prayed for an order directing that notice be served on the petitioning defendant by the Sheriff of Hamilton County, Tennessee, which was done.

Your petitioner by counsel thereafter entered a special appearance in the cause for the sole purpose of moving to dismiss the petition for lack of jurisdiction of his person as he had not been served with valid process in North Carolina. From an adverse decision in the Superior Court, your petitioner appealed to the Supreme Court of North Carolina which held on September 27, 1939 in the case of Barber v. Barber, 216 N. C., 232, 4 S. E. 2d, 447 that the original service of process in 1920 vested the Court with jurisdiction of the person of the petitioner, and that such jurisdiction was not lost by the rendition of a judgment; the Court saying:

> [fol. 29] "This is particularly true of judgments allowing alimony and divorce actions, and in actions for alimony without divorce, in which it may not be said that the judgment is in all respects final. C. S. Supp., 1924, Section 1667."

Following the decision of the foregoing appeal, your petitioner was required to enter a general appearance and demurred to the complainant's petition. The matter was heard in the January, 1940 term in the Superior Court of Buncombe County, North Carolina wherein the following order was entered.

> "This cause coming on to be heard and being heard before the undersigned Judge at the Regular January Term, 1940, of the Superior Court of Buncombe County, upon the demurrer filed by the defendant to the petition of the plaintiff in this cause, and *the Court being of the*

opinion and so holding that the petitioner cannot attack the validity of the divorce set out in the petition in this cause: Now, Therefore, it is Ordered that the demurrer filed by the defendant be, and the same hereby is, sustained as to that portion of the petition and the prayer for relief which seeks to have the Georgia divorce described in the petition declared a nullity. It is Further Ordered that the demurrer be, and the same hereby is, overruled as to all matters set forth in said demurrer, with the exception of the Georgia divorce: And it is Further Ordered that defendant shall have thirty days from the filing of this Order within which to file such pleadings as he may deem advisable. This the 19th day of January, 1940. Wilson Warlick, Judge Superior Court."

The foregoing order is set forth verbatim in the opinion of the Supreme Court of North Carolina in the case of Barber v. Barber, 217 N. C., 422, 8 S. E. 2d, 204., which was an appeal from the order of the Superior Court overruling petitioner's demurrer. No appeal from this judgment was taken by the complainant in this cause, consequently it is res judicata that the complainant cannot attack the validity of the Georgia divorce obtained by this petitioner from the complainant in 1929.

[fol. 30] In the second decision of the Supreme Court of North Carolina, it was held on April 10, 1940 that the Superior Court, by motion in the original cause in a suit instituted for alimony without divorce, to determine the amount owned by the defendant to the complainant under former judgments of the Court, and to enter its decree judicially determining the amount so due and in arrears. This motion to have the Court determine the arrearage did not change the character of the original order for separate maintenance without divorce. It simply imposed upon the Court the onerous duty of making a mathematical calculation of the past due installments. The Clerk of the Court could as readily have performed the simple arithmetic necessary to ascertain the total amount unpaid.

Following the second decision of the Supreme Court of North Carolina, this case was remanded to the Superior Court of Newcombe County, North Carolina and judgment was there entered on the 13th day of June, 1940. A duly certified copy of this judgment was thereafter made the

basis of the present suit filed in Tennessee against your petitioner.

Petitioner respectfully shows the Court that the decree against him in this cause is erroneous in the following respects:

1. *The foreign judgment upon which this suit is based was not a "final" decree*, and accordingly is not entitled to full faith and credit by this Court under Article IV, Section 1 of the Constitution of the United States for the reason that said judgment for separate maintenance without [fol. 31] divorce was rendered under the authority of Section 1667 of the Code of North Carolina which reserved to the Court which rendered the judgment the right to modify or vacate it at any time, even as to past due and unpaid installments. This discretionary right of the Court to modify the judgment prevented complainant from acquiring any vested or absolute right to receive the full judgment from your petitioner, and cannot be a final judgment such as the law requires this Court to give full faith and credit.

2. Complainant's North Carolina decree for separate maintenance without divorce was terminated by petitioner's decree of absolute divorce obtained in Fulton County, Georgia on April 1, 1929. Petitioner was under no more obligation to make application to the courts of North Carolina to cancel the award of separate maintenance upon getting his divorce than his personal representative would have been if petitioner had died.

The reasons why the decree in this case is erroneous in the above respects will be more fully shown in petitioner's brief and argument which is attached hereto and made a part hereof, together with a transcript of the record.

As this Court well knows, the State of North Carolina has been declining to recognize the validity of divorces obtained in other States where service upon the defendant who still resides in North Carolina has been had by publication. In the recent case of Williams, et al. v. State of North Carolina, 87 Law Edition, 189, 63 Sup. Ct. Rep., 207, the Supreme Court of the United States rendered an opinion on December 21, 1942 in a case in which the petitioners were tried and convicted of bigamous cohabitation by the North [fol. 32] Carolina court and sentenced to a term in the State prison. The man and woman who had been thus convicted

had formerly resided in North Carolina where they were each married to other parties, had gone to the State of Nevada where each had obtained a divorce, and had then married each other and had returned to North Carolina to live as man and wife.

The Supreme Court of North Carolina in affirming the conviction held that North Carolina was not required to recognize the Nevada decrees of divorce under the full faith and credit clause of the Constitution. This conviction was reversed by the Supreme Court of the United States.

Under the authority of Williams v. State of North Carolina, supra, the courts of North Carolina would probably, on proper application therefor, cancel and vacate complainant's judgment obtained in the Superior Court of Buncombe County, North Carolina against petitioner on June 13, 1940, which has been made the basis of the decree in the present case. Such delayed justice to the petitioner would not sufficiently protect him however, unless this Court likewise grants this writ of error and reverses the erroneous decree in the present case.

Complainant, according to petitioner's information and belief, still resides in North Carolina, consequently petitioner has given complainant's solicitor due notice of his intention to make this application for writ of error, and the written acknowledgment of such notice is attached hereto and marked Exhibit A. No appeal was taken from the decree in this cause when enrolled because of the fact that petitioner was unable to execute an appeal bond.

[fol. 33] The Premises Considered, Petitioner Prays that a writ of error be granted to him; that the errors in said cause be corrected; and that justice be done him, and he also prays for general relief.

B. Geo. Barber, Petitioner.

Clifford Curry, Solicitor for Petitioner.

Duly sworn to by B. Geo. Barber. Jurat omitted in printing.

[fol. 34] NOTICE

The complainant in this cause will take notice that on the 21st day of June, 1943 in the City of Nashville, Tennessee as solicitor for the defendant B. George Barber, I will pre-

sent a transcript of the record in this cause to the Judges of the Supreme Court of Tennessee, and apply for a writ of error in this cause.

This the 14th day of June, 1943.

Clifford Curry, Solicitor for Defendant.

I hereby acknowledge receipt of the foregoing notice on this the 14th day of June, 1943.

C. W. K. Meacham, Solicitor for Complainant.

[fol. 35] IN SUPREME COURT OF TENNESSEE

ASSIGNMENTS OF ERROR—Filed June 26, 1943

1

The Chancellor erred in holding that the judgment sued upon in this cause was a final judgment when the Supreme Court of North Carolina, in declaring the particular law of this particular case, had expressly held that the ascertainment of the monthly allowances due under former orders "*is not a final judgment in the action, since both the plaintiff and the defendant may apply for other orders and for modification of orders already made*, which the court will allow as the ends of justice require, according to the changed conditions of the parties."

2

The Chancellor erred in holding that the judgment sued upon in this cause was a final judgment because the court had simply added up the amount owed by petitioner under former orders of the same court in the same case for monthly allowance of separate maintenance without divorce, when the Supreme Court of North Carolina, in declaring the particular law of this particular case, had expressly stated that: "*The consolidation of the amounts due, when ascertained in one order or decree does not invest any of these orders with any other character than that which they originally had.*"

3

The Chancellor erred in holding that the judgment sued upon in this cause was not subject to modification but was

final after the adjournment of the term of court at which it was rendered.

[fol. 36] 4

The Chancellor erred in holding that the consolidation of the amounts due under an award of separate maintenance without divorce constituted a final judgment entitled to full faith and credit under the Constitution of the United States.

5

The Chancellor erred in holding that the petitioner could not make the defense in Tennessee in this cause that he had obtained a final decree of absolute divorce from the complainant in Fulton County, Georgia in 1929, and that such defense was available to petitioner only in the original action in North Carolina.

6

Because the Chancellor erred in refusing to grant full faith and credit to a final decree of the Superior Court of Fulton County, Georgia granting petitioner a final decree of absolute divorce from complainant on April 1, 1929, and that despite this absolute divorce petitioner would be held liable in Tennessee for the payment of separate maintenance without divorce to complainant who was no longer his wife.

[fol. 37] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER GRANTING WRIT OF ERROR—Filed June 26, 1943

To the Clerk of the Supreme Court at Knoxville:

File the transcript of the record herein, together with the petition for certiorari and notice. Upon bond in the sum of $250.00 for writ of error being executed, the said writ will be granted. Notify the defendant in error.

This June 21, 1943.

(Signed) Grafton Green, Chief Justice.

[fol. 38] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

Hamilton Equity

STELLA BARBER

v.

B. GEORGE BARBER

OPINION—Filed November 20, 1943

For Publication—Green, J.

This bill was filed seeking recovery on a North Carolina judgment rendered in favor of the complainant against the defendant. From a decree in favor of complainant the defendant has appealed.

The judgment upon which suit is brought represents arrears of alimony or separate maintenance to which the complainant was adjudged to be entitled under a former judgment of the Superior Court of Buncombe County, North Carolina. The determinative question is whether the North Carolina judgment is a final judgment entitled to full faith and credit under the Federal Constitution. As above seen, the chancellor held it to be of that character. This conclusion is challenged by the complainant.

There is a divergence of opinion in the several States as to the power of the court to modify provisions for alimony as respects past due installments. The decisions are collected in a Note in 94 A. L. R., 331. At the time this Note was prepared, it does not appear that the North Carolina court had expressed itself upon this question so [fol. 39] far as we are able to ascertain.

In Sistaire v. Sistaire, 218 U. S., 1, 54 L. ed., 904, the Supreme Court reviewed its former decisions respecting the nature of judgments for alimony and expressed itself thus:

"First, that, generally speaking, where a decree is rendered for alimony and is made payable in future installments, the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification

of the decree has been made prior to the maturity of the installments, since, as declared in the Barber Case, 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' Second, that this general rule, however, does not obtain where, by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony has been made prior to the installments becoming due."

The judgment upon which suit is herein brought was affirmed by the Supreme Court of North Carolina. In Barber v. Barber, 217 N. C., 422, the complainant had filed [fol. 40] a petition and motion in the original cause stating that her husband was in arrears in the payment of the alimony ordered, and prayed that the amount of the arrears be determined by the court, and judgment entered in her favor for the amount. Defendant demurred on the ground that the petition alleged a personal action in debt, and sought to recover a new judgment in debt and submitted that relief could not be had by motion in the cause. The Supreme Court overruled this contention, as the lower court had done, and affirmed the judgment below for the amount of the past due installments. In speaking of the judgment rendered, however, the Court said:

"It is not a final judgment in the action, since both the plaintiff and the defendant may apply for other orders and for modifications of orders already made, which the court will allow as the ends of justice require, according to the changed conditions of the parties. The orders made from time to time are, of course, *res judicata* between the parties, subject to this power of the court to modify them. The consolidation of the amounts due, when ascertained on one order or decree, does not invest any of these orders with any other character than that which they originally had. If the defendant is in court only for reason of the original service of summons, he is in court only for such orders as, upon motion, are appropriate and customary

in the proceeding thus instituted. There is no reason why a judgment should not be rendered on an allowance for alimony, which is a debt and more than an ordinary [fol. 41] one. The court below, in its sound discretion, which is not ordinarily reviewable by this Court, under the motion of plaintiff in this cause can hear the facts, change the conditions of the parties, the present needs of support of any of the children and, in its sound discretion, render judgment for what defendant owes under the former judgment and failed to pay and see to it that such judgment is given to protect plaintiff, and 'give diligence to make her (your) calling and election sure.'".

The foregoing language of the North Carolina Court seems to stamp the judgment sued on as belonging to that class held not to be final by the Supreme Court in Sistaire v. Sistaire; and therefore not entitled to the protection of the full faith and credit clause of the Constitution of the United States.

Under the authority of Sistaire v. Sistaire, supra, therefore, and considering the nature of the judgment herein sued on as defined by the Supreme Court of North Carolina, we must conclude that the chancellor erred in his disposition of the matter.

The defendant has moved to dismiss the writ of error granted herein for the reason that it was granted more than two years after the chancellor rendered his opinion. However, the writ was granted within two years after the decree below was entered. Time runs against a writ of error [fol. 42] from the date of the entry of the decree rather than from the ruling of the chancellor. Smith v. Sprout, 58 S. E. (Ct. App.), 376, affirmed by this Court.

Reversed and bill dismissed.

Bryan, C. J.

[fol. 43] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

STELLA BARBER

vs.

B. GEORGE BARBER

Reversed and Dismissed

DECREE—Filed December 20, 1943

This cause came on to be heard on the transcript of the record from the Chancery Court of Hamilton County, filed for writ of error, assignments of error, briefs and argument of counsel; and upon consideration thereof the Court is of opinion that there is error in the decree of the Chancellor as shown in the opinion of the Court filed and made a part of the record in this cause, and for the reason set forth in said opinion, the decree of the Chancellor is reversed.

It is, therefore, ordered, adjudged and decreed by the Court that the decree of the Chancellor be, and the same is reversed, set aside and for nothing held, and the bill of the complainant is dismissed.

The complainant, Stella Barber, and sureties on cost bond, C. W. K. Meacham and E. K. Meacham, will pay the costs of the cause in this Court and the Court below, for which let execution issue.

[fol. 44] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

PETITION TO REHEAR—Filed December 8, 1943

To the Honorable, the Supreme Court of the State of Tennessee:

Your petitioner, the complainant and appellee in this cause respectfully shows to the Court that she is greatly aggrieved by the Opinion announced and the decree rendered, reversing and dismissing this cause on November

20, 1943, whereby it was held that the judgment sued on was not a final judgment, entitled to the protection of the "full faith and credit" clause of the Constitution of the United States, the Court saying the "language of the North Carolina Court seems to stamp the judgment sued on as belonging to that class held not to be final by the Supreme Court in Sisfaire vs. Sisfaire, and, therefore, not entitled to the protection of the full faith and credit clause of the Constitution of the United States."

Petitioner respectfully submits that, in making its decision,—

First: The Court apparently overlooked the fact that the judgment sued on was rendered on application of petitioner for final judgment on accrued installments of ali- [fol. 45] mony for purpose of enforcement. Defendant had opportunity, but did not apply for modification. (See brief attached.)

Second: The Court misconstrued the Opinion of the North Carolina Court as holding that the judgment sued on was not final, but belonged to that class of judgments subject to modification as the discretion of the Court. (See attached brief.)

Petitioner, therefore, prays for a rehearing on these points, and that said decree be so corrected as to give petitioner an affirmance of the judgment sued on, and for general relief.

——, Solicitors for Petitioner.

Brief of Petitioner

First: Purpose of Motion Was a Final Judgment.

Petitioner earnestly insists that the purpose for filing the motion was to obtain a final judgment for accrued installments of alimony in order that she might enforce payments thereof, and that the North Carolina Courts so considered, and attempted to award her a final enforceable judgment.

Defendant, B. George Barber, was before the Court when the original Order awarding monthly alimony was made, [fol. 46] and also at the hearing on the motion for final aggregate judgment:

Barber vs. Barber, 216 N. C., 232, 4 S. E. (2d) 447.
Barber vs. Barber, 217 N. C., 422, 8 S. E. (2d), 205.

That the Supreme Court of North Carolina understood the real purpose of petitioner was to obtain a final judgment is shown in the opening paragraph of its opinion, which reads as follows:

> "Has the Superior Court power by motion in the original cause, in a suit instituted for alimony without divorce, to determine the amount owed by the defendant to the plaintiff under the former judgments of the Court and to enter its decree judicially determining the amount so due and in arrears? We think so."
>
> Barber vs. Barber, 217 N. C., 422, 8 S. E. (2d), 205.

That the North Carolina Court thus understood the motion or action and attempted to give her a final decree on accrued installments seems clear from the same Opinion, as follows:

> "A judgment awarding alimony is a judgment directing the payment of money by a defendant to plaintiff, and by such judgment the defendant becomes indebted to the plaintiff for such alimony as it becomes due, and *when the defendant is in arrears in the payment of alimony* the Court may, on application of plaintiff, judicially determine the amount then due and enter its decree accordingly. The defendant, being a party to the action and having been given notice of the motion, is bound by such decree, and *the plaintiff is entitled to all the remedies provided by law for the enforcement thereof.*" (Italics ours.)
>
> [fol. 47] Barber v. Barber, 217 N. C. 422, 8 S. E. (2d) 205.

The finality of the judgment is further emphasized by the following language of the Supreme Court of North Carolina:

> "There is no reason why a judgment should not be rendered on an allowance for alimony, which is a debt and more than an ordinary one. The Court below, in its sound discretion, which is not ordinarily reviewable by this Court, under the motion of plaintiff in this cause can hear the facts, change the conditions of the parties, the present needs of support of any of the

children and, in its sound discretion, render judgment for what defendant owes under the former judgment and failed to pay and see to it that such judgment is given to protect plaintiff, and 'give diligence to make her (your) calling and election sure.'"

Barber vs. Barber, 217 N. C., 422, 8 S. E. (2d), 205.

The North Carolina Court accordingly gave her all remedies provided by law for the enforcement of final judgments. That Court, having had power to award a conditional judgment for monthly alimony, certainly had power to make the conditional judgment final by proper decree with respect to accrued installments. It thus pronounced accrued installments to be a debt, and gave the remedy for its collection. The Supreme Court of North Carolina says the Trial Court, in its sound discretion, rendered judgment for what defendant owed under the former judgment and failed to pay, and, therefore, affirmed the judgment. What else could the Court do to make a judgment final? How else could petitioner obtain a final judgment? The language [fol. 48] used by the Court was wholly inconsistent with any meaning or construction other than finality of the judgment. Petitioner, therefore, respectfully insists that the holding that the judgment was not final renders that judgment purposeless and valueless, and, in effect, finds that the Courts of North Carolina were doing a vain thing.

The following well-considered cases hold that the power retroactively to modify provisions of a divorce decree with respect to accrued alimony is not conferred by statute authorizing the Court to amend or alter such provisions, and that judgments for alimony payable in installments, absolute in terms, constitute final judgments with the "full faith and credit" clause of the Federal Constitution where such installments have accrued:

Armstrong vs. Armstrong, 160 N. E. 34, 57 A. L. R. 1108.

Holton vs. Holston, 153 Minn., 346, 190 N. W. 542, 41 A. L. R. 1415.

Afair vs. Superior Court, 44 Ariz., 139, 33 Pac. (2d), 995, 94 A. L. R. 328.

The case of *Armstrong vs. Armstrong* seems to be particularly applicable since this defendant removed from

North Carolina, where the judgment was rendered, to Tennessee, where he now resides. Petitioner, therefore, quotes therefrom the following:

[fol. 49] "The record in this case discloses that the husband is now a resident of Ohio. How long he has been such resident does not appear, but he has made no payment upon the judgment since 1917, although the same has been in no manner modified, and it is fair to assume that no application for its modification has been made by either party. In the absence of modification the judgment is enforceable as awarded. Is the wife to be precluded from the enforcement of her judgment in another state, where the husband has become a resident, because perchance he would have been permitted to file an application for modification thereof had he felt disposed to submit himself to the jurisdiction of that court? The language of the Supreme Court of Kentucky in the case of Parks v. Parks, 209 Ky., 127, 272 S. W., 419, the last case decided by that court on the subject, is pertinent: 'If the husband moves out of the jurisdiction of the court, and so remains continuously for a long period of time, he renders the statute nugatory and the court without power to act further. Such a litigant ought not be permitted to evade the letter and spirit of the statute as applied to himself, and at the same time use it as a weapon against his helpless adversary.'

"It is quite clear under this decision that the defendant would not be heard upon the matter of canceling installments accruing during his absence from the state. No facts have been disclosed, which, under any of the decisions cited, could have entitled the defendant to a retrospective modification of his judgment. Under the decisions cited and the reasoning supporting them the judgment was valid and enforceable in Kentucky, and hence under the full faith and credit clause of the Federal Constitution should be given effect in this state."

The case of Buchholtz vs. Buchholtz, 175 Tenn., 90, holds that a decree awarding alimony in *futuro* may be rendered by exception, that such a decree is in and of itself an award of execution, and that a final decree for a specific sum, without reservation, cannot be modified or abrogated.

It therefore seems that the purpose of the suit having been for a final judgment, and the North Carolina Court having so considered, the judgment sued on should be construed to be a final judgment.

[fol. 50] *Second: Opinion* of North Carolina Court Misconstrued:

Petitioner respectfully suggests that the Honorable Court mistakenly construed the Opinion of the Supreme Court of North Carolina.

The lower Court made an Order, awarding monthly alimony to petitioner. That award, with respect to unmatured installments, was certainly subject to modification by the Court through res judicata between the parties:

Barber vs. Barber, 217 N. C., 422, 8 S. E. (2d), 205.

Accrued installments, whether subject to modification or not, were valid and binding until modified by the Court. If subject to modification, the Court had unquestionable power to make them final judgments by proper decree. The North Carolina Court undertook, it seems, to do so, and awarded remedies for enforcement of the subject. That appears to have been its purpose in awarding the judgment sued on.

Two kinds of judgment were before the Court: the original Order awarding monthly alimony, and the subsequent judgment for the aggregate of accrued alimony, which petitioner insists was a final judgment. The language of the Opinion, as follows: "It is not a final judgment in the action since both the plaintiff and defendant may apply for other orders and for modification of orders already made, which the Court will allow as the ends of justice require according to the final judgments of the parties" [fol. 51] while somewhat confusing, seemingly may as well apply to the original Orders with respect to future installments as to the subsequent judgment of accrued alimony. In fact, it more logically refers to the original Order, and calls attention to the fact that this judgment with respect to accrued installments does not affect the right of defendant yet to apply for modification of the original Order with respect to future installments. The judgment sued on covers accrued installments, concerning which no condi-

tions for modification existed; or, at least, defendant, who was before the Court and vigorously defended, made no application for, and assigned no conditions entitling him to, modification. The right to change the original Order remained to defendant if subsequent conditions authorized a change with respect to future installments. Accordingly, in order to make the Opinion of the North Carolina Court have meaning and force, the right to change must be limited to future installments, and the judgment on accrued installments held to be final.

Such an interpretation makes the Opinion of the North Carolina Supreme Court consistent and forceful. Otherwise, it is inconsistent, and meaningless.

Petitioner earnestly prays that this Honorable Court reconsider its Opinion and decision, and affirm the lower Court.

Meacham & Meacham, Solicitors for Petitioner.

Received copy of the foregoing petition on this the 7th day of Dec. 1943.

Clifford Curry, Solicitor for Defendant.

[fol. 52] [File endorsement omitted]

IN THE SUPREME COURT OF TENNESSEE

[Title omitted]

REPLY BRIEF OF DEFENDANT TO PETITION FOR REHEARING—Filed December 14, 1943

The law governing this case has already been thoroughly considered by the Court and there is no merit in the petition for rehearing filed by complainant. The controversy has been pending for years, and there is no need to cite additional authorities.

Since the Supreme Court of North Carolina in Barber v. Barber, 217 N. C., 422 has specifically held that the judgment sued on in this cause is not a final judgment, then the case comes squarely under the exception to the general rule as stated in Sistaire v. Sistaire, 218 U. S. 1, 54 L. Ed., 905

quoted by Chief Justice Green in his opinion in the present case.

Defendant therefore respectfully submits that this petition for rehearing should be denied.

Respectfully submitted, Clifford Curry, Solicitor for Defendant.

Receipt is hereby acknowledged of the above reply brief of defendant on this the 13th day of December, 1943.

C. W. K. Meacham, Solicitor for Complainant.

[fol. 53] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

DECREE DENYING PETITION TO REHEAR—Filed January 8, 1944

This cause came on to be further heard on the petition of the complainant, Stella Barber, for a rehearing, the answer thereto, by the defendant, and briefs and counsel; and upon consideration thereof the Court is of opinion that the petition to rehear is not well taken, and said petition to rehear is denied at the costs of the petitioner, Stella Barber, C. W. K. Meacham and E. K. Meacham, for which let execution issue.

[fol. 54] IN THE SUPREME COURT OF TENNESSEE

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—February 29, 1944

To W. H. Eagle, Esquire, Clerk of the Supreme Court in Knoxville, Tennessee:

You are hereby requested to make a transcript of the record in this cause to be filed in the office of the Clerk of the Supreme Court of the United States in connection with the petition of Mrs. Stella Barber for writ of certiorari to

review the decree of this Court herein and to include in such transcript of record the following, and no other, papers or exhibits unless requested by defendant, to-wit:

1. Original bill and Exhibit "A", including certificates attached.

2. Answer of defendant.

3. Stipulation.

4. Record of Appeal in Case No. 109, Fall Term, 1939, called for in stipulation and filed May 21, 1941.

5. In order to save repetition, it is agreed by the parties that the Clerk shall copy only the following parts of record of appeal in Case No. 100, Spring Term, 1940, called for in stipulation and filed May 21, 1941, to-wit:

(a) Stipulation on Page 1.

(b) Demurrer and motion to dismiss, pp. 18 and 19.

(c) Order of Warlick, Judge, p. 20.

(d) Appeal entries, p. 20, all of p. 21.

6. Memo of Chancellor.

7. Final decree of Chancellor enrolled June 26, 1941.

8. Petition of defendant for writ of error, but not including brief and argument.

9. Assignment of errors immediately following petition on pp. 10 and 11.

10. Order of Supreme Court granting writ of error.

[fol. 55] 11. Opinion of Supreme Court.

12. Decree of Supreme Court reversing case.

13. Petition of complainant to rehear.

14. Answer of defendant to said petition.

15. Order overruling petition to rehear on or about January 8, 1944.

16. This praecipe.

The Clerk of the above entitled Court is requested to include in the transcript of the record only the papers designated herein. Said transcript to be prepared as required by law and the rules of this Court and the Supreme Court of the United States, and to be filed in the office of the Clerk

of the Supreme Court of the United States with petit
of complainant for writ of certiorari to review the final
cree of this Court.

Chattanooga, Tennessee, February 29, 1944.

C. W. K. Meacham, Solicitor for Complaina

Service of the above praecipe is hereby accepted and
knowledged, that praecipe calls for all material parts
the record, and that No. 5, above, shall include only the
portions of record of appeal, No. 100, as called for, t
other parts of said record being included in record of a
peal; No. 109.

This February 29, 1944.

Clifford Curry, Solicitor for Defendai

[fol. 56] Clerk's Certificate to foregoing transcript omi
ted in printing.

[fol. 57] Supreme Court of the United States

Order Allowing Certiorari—Filed May 15, 1944

The petition herein for a writ of certiorari to the Su
preme Court of the State of Tennessee is granted.

And it is further ordered that the duly certified copy of
the transcript of the proceedings below which accompanied
the petition shall be treated as though filed in response to
such writ.